88-1591

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

SANTA FE PACIFIC REALTY CORPORATION,
a Delaware Corporation,
Petitioner,

vs.

CITY OF BERKELEY,
a Municipal Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the ripeness doctrine applicable to taking claims brought under the Just Compensation Clause of the Fifth Amendment require a landowner to submit a development application to a local agency even though the agency is legally unable to approve the application because the confiscatory terms of the governing voter-imposed zoning ordinance finally and authoritatively fix the type and intensity of development permitted on the property?

2. Can the Ninth Circuit's prevailing rule that the ripeness doctrine requires landowners to pursue administrative remedies which are "as practical matter futile" be reconciled with this Court's ripeness decisions, as adhered to in other circuits, that consider a claim ripe whenever the governmental entity has finally and authoritatively fixed the type and intensity of permitted development?

PARTIES TO THE PROCEEDINGS AND RULE 28.1 LIST

The only parties to this proceeding are petitioner, Santa Fe Pacific Realty Corporation, a Delaware corporation, and respondent, the City of Berkeley, a municipal corporation. Santa Fe Land Improvement Company, a California corporation, the plaintiff and appellant in the courts below, was merged into Santa Fe Pacific Realty Corporation. Petitioner knows of the following additional entities within the meaning of Supreme Court Rule 28.1 that should be disclosed:

Santa Fe Southern Pacific Corporation, a Delaware corporation

Southern Pacific Company, a Delaware corporation

Santa Fe Natural Resources, Inc., a Delaware corporation

The Atchison, Topeka and Santa Fe Railway Company, a Delaware corporation

Santa Fe Energy Partners, L.P., a Delaware corporation

Santa Fe Pacific Pipeline Partners, L.P., a Delaware corporation

Santa Fe Industries, a Delaware corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Santa Fe Pacific Realty Corporation (hereinafter "Santa Fe"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in August 29, 1988. Santa Fe's petition for rehearing in the Court of Appeals was denied on January 3, 1989.

I

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not reported and is reprinted in the appendix at page A-26. The Court of Appeals orders requiring a response to the petition for rehearing and denying rehearing are set forth in the appendix at A-31 and A-32. The orders of the United States District Court for the Northern District of California dismissing the complaint are reprinted in the appendix at A-14 and A-25, and the district court's remarks from the bench setting forth the basis for its ruling are reprinted in the appendix at A-1. The district court's orders of dismissal are not reported.

II

JURISDICTION

Santa Fe commenced this action by filing a complaint in the United States District Court for the Northern District of California invoking federal jurisdiction under 42 U.S.C. § 1983; 28 U.S.C. §§ 1331, 1343; the Just Compensation and Due Process Clauses of the Fifth Amendment and the Fourteenth Amendment; and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. On August 26, 1987, the district court entered an order granting the respondent City of Berkeley's motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1).

Following a timely appeal by Santa Fe brought pursuant to 28 U.S.C. § 1291, the United States Court of Appeals for the Ninth Circuit entered a judgment and opinion on August 29, 1988, affirming the district court. A petition for rehearing was timely

filed and, after the Court of Appeals ordered opposition to the petition, the petition was denied on January 3, 1989.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

III

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional provisions are relevant to this petition:

1. The Fifth Amendment to the United States Constitution:

> [N]or shall private property be taken for a public use without just compensation.

2. The Fourteenth Amendment, section 1, to the United States Constitution:

> No state shall deprive any person of life, liberty, or property without due process of law. . . .

IV

STATEMENT OF THE CASE

The Berkeley waterfront on San Francisco Bay has only two owners: one public—the City, and one private—Santa Fe. (CR 1 at 3:10-4:12, Exh. A)[1] Over the years the City has authorized extensive private commercial development for profit on its own

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[1] The statement of the case is drawn from Santa Fe's complaint which the district court was required to accept as true for purposes of a ruling under Federal Rule of Civil Procedure 12(b)(1). *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Citations to CR are to the Clerk's Record in the Court of Appeals. The control numbers following the CR citations are references to the relevant pleadings listed by number in the docket sheet of the district court. The page and line citations which follow are to the pleadings, or exhibits to the pleadings, referenced. Included in the appendix to this petition for the convenience of the Court is a map of the Berkeley Waterfront showing Santa Fe's and the City's property. (App.

68-acres of property, which is contiguous to Santa Fe's.[2] (CR 1 at 5:13-6:7) However, Santa Fe's dry land, covering 174 acres, remains undeveloped because the City has consistently rejected all of the numerous development plans, conceptual plans, and formal and informal development requests submitted by Santa Fe over a period of approximately twenty years. (CR 1 at 4:1-5, 6:8-11)

The reasons given for the City's repeated denials of Santa Fe's proposals have always been a pretext; the true reason has always been that the City was committed to preserving Santa Fe's property as open space without compensating Santa Fe. (CR 1 at 6:12-14, 23:26-24:8) Finally, in 1986, as a direct response to Santa Fe's most recent development efforts (which cost Santa Fe more than $4.5 million), the Berkeley electorate adopted Measure Q—an initiative ordinance whose express purpose was to preserve in perpetuity the bulk of Santa Fe's property as open space. (CR 1 at 22:3-23:2, 23:6-11) The unalterable terms of the ordinance are so restrictive that they preclude any economically viable development of Santa Fe's property. (App. A-44-A-49; CR 1 at 24:9-26) The net effect of Measure Q, which is directed solely at Santa Fe, is to preserve Santa Fe's property for public use without compensating Santa Fe. (CR 1 at 25:1-6) Because of Measure Q's confiscatory effect, Santa Fe asserted its constitutional rights in federal court. (CR 1)

A. Over A Period Of Twenty Years Santa Fe Unsuccessfully Attempts To Secure The Right To Develop Its Berkeley Waterfront Property

In 1964, after Santa Fe publicly announced its intention to develop its waterfront property, the City of Berkeley adopted a Master Plan which designated Santa Fe's waterfront property as "an area to be studied" and which reserved the Berkeley shoreline

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at A-56) The map was attached to Santa Fe's complaint in the district court. (CR 1, Exh. A)

[2] The City has permitted construction of a 375-unit hotel, a convention complex, office buildings, restaurants, sailing clubs, a boat repair yard, and a 1,000 berth commercial marina on its own property. (CR 1 at 5:13-20)

(with the exception of the City's own property) "exclusively for public recreation." (CR 1 at 6:15-20) Although the City claimed it was exploring the possibility of acquiring Santa Fe's property for a public purpose, in fact no funding was then or has ever been obtained in the intervening twenty years to compensate Santa Fe for the City's actions prohibiting any reasonable economic use or development of Santa Fe's waterfront property. (CR 1 at 6:21-7:1, 18:15-21, 19:23-20:3, 25:1-6)

Thus, between 1964 and 1983, while expending millions of dollars, Santa Fe pursued every conceivable avenue available to it to obtain approval of some reasonable and economically viable use of its property. These attempts have taken a wide variety of forms over the years, and between 1981 and 1986 alone cost Santa Fe more than $4.5 million. (CR 1 at 23:6-11) From 1971 forward Santa Fe unsuccessfully submitted: (1) applications for development; (2) development proposals; (3) conceptual plans for waterfront development; (4) a major use permit application; and (5) two specific development applications for a hotel, an office building, and related tract map. (CR 1 at 7:2-16, 8:10-9:26, 11:16-13:3, 13:17-15:5) In connection with these proposals, Santa Fe offered to dedicate 100 percent of its submerged and tidal lands (505 acres) for public use; and as much as 50 percent of its dry property to open space. (CR 1 at 11:16-13:3) It made major financial and logistical contributions to environmental impact reports [CR 1 at 8:10-9:19, 13:17-23], and relied on continued representations by the City that cooperative planning efforts would result in a meaningful development agreement. (CR 1 at 13:17- 14:22) It also met on innumerable occasions with City officials over the years, each of whom continuously represented that Santa Fe's cooperation would lead to a satisfactory development agreement which would enable Santa Fe to engage in the reasonable development of its property. (CR 1 at 8:13-23)

In response to these good faith efforts by Santa Fe, the City has seized on one device after another to delay, ignore and ultimately reject each of the separate and detailed development proposals submitted. (CR 1 at 4:21-24, 6:15-19:3) The City has also acted in bad faith by consistently undermining all cooperative planning efforts to permit reasonably phased development of Santa Fe's

property and manipulating the process to ensure that Santa Fe's applications would ultimately be denied. (CR 1 at 8:13-23, 9:20-26) It has twice designated Santa Fe's property as an area "to be studied," without ever conducting any studies during the extended period when Santa Fe's property was being involuntarily preserved as open space. (CR 1 at 6:15-20, 7:19-24) In the same vein, in 1983, the City turned away Santa Fe's development efforts by failing to act on them and instead opening the matter up to a so-called "public planning process." (CR 1 at 9:20-26) However, the City never intended to utilize the "planning process" in a way that would permit reasonable development of Santa Fe's property. (CR 1 at 9:20-26) Alternatively, when the City chose to act on Santa Fe's development applications, it rejected them on sham grounds by labeling Santa Fe's submissions as "inadequate" or "incomplete," when in fact the submissions were extremely detailed and comprehensive. (CR 1 at 12:18-24, 12:20-26) When these sham denials no longer served the City's purpose, it enacted three successive moratoriums on any waterfront development and made the moratoriums applicable only to Santa Fe's property, but not to its own. (CR 1 at 15:20-16:6, 16:19-25, 17:16-23)

In the meantime, the City instructed its own environmental impact consultant to come up with a proposal which would allow Santa Fe only 500,000 square feet of development on the more than seven million square feet of land potentially available for development. (CR 1 at 16:26-17:4) When the City's consultant nonetheless determined that the minimal development that would allow Santa Fe to make economically viable use of its land was 705,000 square feet and submitted a report to that effect, the City rejected the recommendation, adopting instead an alternative of 565,000 square feet—or 20% less than that recommended by the consultant. (CR 1 at 17:24-18:18) Then in February of 1986, in response to Santa Fe's pending applications, the City prepared a "Waterfront Plan" amendment to the City's Master Plan and a "Specific Plan" for the waterfront aimed exclusively at Santa Fe's

property. (CR 1 at 18:22-26)[3] The admitted purpose of these plans was to formalize the City's longstanding policy that Santa Fe's land should be maintained as public open space and in an undeveloped state. (*See*, CR 1 at 18:22-26; CR 19, Exh. 2, p. 4; Exh. 3, p. 5)

The Waterfront Plan "designate[d] the Waterfront as an area primarily for recreational, open space, and ecological uses," and detailed in unusually precise terms the specific types, intensities, and locations of the severely limited private development it purported to permit. (CR 19, Exh. 2, p. 1) The Specific Plan in turn established the requirements for accomplishing the primary goal of the Waterfront Plan (setting aside the waterfront for public uses) and for controlling the minimal private development permitted by the Waterfront Plan. (CR 19, Exh. 3, pp. 5-12) The Specific Plan included "text and diagrams addressing the distribution, location and intensity of land uses, including open spaces within the plan area," as well as all infrastructure improvements. (CR 19, Exh. 3, p. 1) The various sections of the Specific Plan precisely depicted the types, intensities, locations and phases of development for the square footage that could be developed. (*Id.*, pp. 15-24) These highly detailed requirements and restrictions included the exact number, dimension, location, phasing and design of all land uses, buildings, roadways, bike paths, parking spaces, pedestrian routes, sewers and water drains, street facades, open-space areas, walls, fences, landscaping, signs, lighting and the like. (*Id.*)

The Plan also contained a pro-forma provision for permit applications which *prohibited* any application that deviated from, or was inconsistent with, its specific and detailed requirements. (*Id.*, §§ 7.3.1, 7.3.4b, 7.3.8a, pp. 70, 71, 74; *see also*, CR 18 at 15) Thus, no development could be permitted on Santa Fe's property that was inconsistent with the Specific Plan's terms. (*Id.*, pp. 70-72, 74)

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[3] California statutes require General or Master Plans and amendments for control of all land development. Cal. Gov. Code §§ 65300-65303, 65350. They also permit Specific Plans to implement such General or Master Plans. Cal. Gov. Code §§ 65450-65455.

B. Measure Q Is Adopted By The Voters Of Berkeley In November Of 1986 In Order To Finally And Authoritatively Fix And Limit The Type And Intensity Of Development For Santa Fe's Waterfront Property

While the Specific Plan's terms expressly prohibited any development application that was inconsistent with its policies and standards, since the Specific Plan had been adopted by the City Council, it was at least theoretically subject to change by that body. In November of 1986, however, the voters took matters into their own hands and foreclosed any possibility of a change in the terms of the Specific Plan.

In the November, 1986 election, Measure P and Measure Q were placed on the ballot to be voted upon by Berkeley's electorate. (CR 1 at 20:9-15, 22:3-23:2)[4] Both were targeted directly and exclusively at Santa Fe's waterfront property, and each was drafted by interests hostile to Santa Fe as a response to Santa Fe's proposals to develop its waterfront property. (App. A-34, A-41, A-44, A-52) In their ballot argument against competing Measure P, the proponents of Measure Q described Santa Fe as a "greedy company" who had "continually tried to bully the city with lawsuits." (App. A-41) Measure Q, as drafted by the Sierra Club Waterfront Taskforce, was therefore intended to stop Santa Fe's supposed "bullying tactics" [*id.*] by:

> —Finding that it was in the public interest to preserve, protect, reclaim and/or restore [areas owned by Santa Fe (the Meadow, Brickyard and Beach)] in a natural, open and undeveloped form (App. A-44, § 1);
>
> —Requiring that the Meadow be maintained as open space with only one possible minor and economically unviable exception (App. A-45-A-46, § 3a);
>
> —Requiring that the Brickyard and the Beach be maintained as public open space with the exception of a 5,000 square-

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[4] For the convenience of the Court, the texts of Measures P and Q, and the ballot arguments in the official pamphlet submitted to the voters, all of which were the subject of judicial notice below, are reproduced in the appendix at A-33-A-55.

foot "nature interpretive center" permitted on the 29.2 acre Brickyard tract (App. A-46, § 3b);

—Restricting the total development of all Santa Fe's Waterfront property to no more than 565,000 square feet of building space (App. A-46, § 3(c)(2));

—Requiring the City's Master Plan, Waterfront and Specific Plans, and Zoning Ordinance to be amended to incorporate and conform to the policies set forth in Measure Q (App. A-47, § 4);

—Providing that the Waterfront Plan and Specific Plan be adopted by and incorporated into Measure Q (*Id.*); and

—Mandating that "[n]o part of this ordinance shall be amended or repealed, *except by a vote of the people.*" (App. A-48, § 7) (emphasis added).

Thus, a key purpose of Measure Q, as it was submitted to the voters, was to preclude Berkeley's City Council from amending the scope or intensity of the permitted uses specified in Measure Q. Indeed, Measure Q differed from Measure P primarily because Measure P left the extent of permissible development by Santa Fe to the City Council, whereas Measure Q did not permit the City Council to alter the uses specified in the ordinance. (App. A-51) As the proponents of Measure Q told the voters in the official voter pamphlet, Measure Q "[p]laces an absolute cap on all development on the privately owned lands at the waterfront." (*Id.*) The opponents of Measure Q (the backers of Measure P) agreed, pointing out that Measure Q "locked the City in" to the allowed development and that result could "only be undone by a future ballot measure. . . ." (App. A-53) Measure Q received the most votes at the general election and under California law was adopted as the ordinance controlling any proposed development on Santa Fe's waterfront property. (CR 1 at 23:3-5; CR 19 at 8- 10)

C. Because The Maximum Development Permitted By Measure Q Is Confiscatory, Santa Fe Files Its Complaint Seeking Just Compensation

On March 2, 1987, Santa Fe filed a complaint in United States District Court for the Northern District of California, alleging constitutional claims for relief in: inverse condemnation for the taking of its property without just compensation; denial of its right to equal protection based on the unfairness in requiring Santa Fe to provide open space at its expense while the City enjoyed a profitable commercial use of its contiguous property; denial of due process for the arbitrary, wrongful, and unlawful preclusion of Santa Fe from the use of its property; and violations of 42 U.S.C. § 1983, based on the foregoing allegations. (CR 1 at 12, 25, 26, 27)

On May 22, 1987, the City filed a motion to dismiss for want of jurisdiction pursuant to Rule 12(b)(1), alleging that despite two decades of frustration culminating in the enactment of Measure Q, Santa Fe's complaint was not ripe for judicial review because Santa Fe had not made yet another development application and request for variance after the voters enacted Measure Q. (CR 11; CR 12) Santa Fe asked the district court to judicially notice the terms of Measure Q, and the Waterfront and Specific Plans that it incorporated, and argued that Measure Q was plainly intended by the voters to be the final and authoritative response to its many applications. (CR 18) Accordingly, no further applications were necessary because the definitive position of the City was known and the maximum development permitted by Measure Q was confiscatory. (*Id.*) After the City replied [CR 21], on August 3, 1987, the district court heard argument on the City's motion. (CR 22)

At the hearing the court indicated its belief that a futile application to the City should not be required under the ripeness doctrine, and that the terms of Measure Q did not appear to permit the City to act favorably on any development application by Santa Fe that did not comply with the requirements of Measure Q and the Waterfront and Specific Plans it incorporated. (App. A-11) The court also seemed to recognize that the City had pursued a course over many years designed "essentially [to]

forestall any finality requirement that the courts require. . . ." and acknowledged that Measure Q had indeed been enacted as a direct response to Santa Fe's efforts to develop its property. (App. App. A-9, A-11)

The district court refused, however, to take the next logical step and deny the motion because it perceived that the Ninth Circuit's then recently issued opinion in *Kinzli v. City Of Santa Cruz*, 818 F.2d 1449, amended by, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, ____ U.S. ____, 98 L.Ed.2d 861 (1988), reflected "a higher . . . frustration . . . quotient than some of us would tolerate." (App. A-12) The court interpreted *Kinzli* as requiring that an application and request for variance must always be filed with the responsible zoning authority in order to create a ripe dispute. (*Id.*) The court then applied *Kinzli* largely because of the City's attorneys' representation (despite the clear intent of the voters to the contrary) that the City Council had the ability to alter Measure Q's exacting requirements in response to a development application and a request for variance fron Santa Fe. (App. A-6, A-12) At the same time, the district court expressed concern and sympathy for Santa Fe's predicament, noting that "this has gone on, as in many other cases that we have, for years and years and years, where litigants or property owners are caught in a bureaucratic morass that has no end and can never get into court." (App. A-12) The court thereafter filed its order dismissing the complaint [CR 23, 24] and Santa Fe's timely appeal followed. (CR 25)[5]

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[5] Neither the district court nor the Court of Appeals addressed Santa Fe's due process or equal protection arguments. (App. A-28-A-30) The district court also declined to reach a second prematurity argument urged by the City: that there existed an adequate and available state remedy which Santa Fe was required to pursue in state court prior to filing its complaint in federal court. (CR 23, n.3) *See, Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985). However, this argument was without merit because there is no adequate and available state remedy in California for Santa Fe's principal claim of inverse condemnation. *Agins v. City of Tiburon*, 447 U.S. 255, 259 (1980); *Furey v. City Of Sacramento*, 780 F.2d 1448,

On August 29, 1989, the Court of Appeals affirmed the district court in an unpublished opinion [App. A-26] which accepted the proposition that Santa Fe must go through the formality of refiling yet another expensive and time-consuming development application and request for a variance to obtain a "final decision" after Measure Q, even though it conceded that:

> —All pre-Measure Q development applications for permitted uses under Berkeley's prior zoning ordinances had been rejected (App. A-27);
>
> —Measure Q endorsed highly detailed and technical requirements which severely limited development of the Waterfront and the Specific Plans (*Id.*);
>
> —Measure Q could not be amended except by a vote of the people (App. A-28); and
>
> —As a result of the passage of Measure Q, even if Santa Fe were to make another application, the futility of further administrative proceedings, "may be true . . . , as a practical matter." (App. A-29)

Santa Fe petitioned for rehearing and pointed out that the Ninth Circuit had erroneously applied the ripeness doctrine to relegate Santa Fe to the application process when it would serve no purpose to do so because the confiscatory development limits in voter-imposed Measure Q could not be amended by the City Council even if Santa Fe filed an application. Indeed, the petition noted that every case cited by the court to support its holding that this case was not ripe involved a zoning regulation or ordinance that gave the pertinent administrative body discretion to take some meaningful action in response to a development application or variance request submitted by the landowner. *E.g., MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986) (plaintiff could seek further administrative application and it appeared that requested development would be allowed to proceed); *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty.*, 841 F.2d 872 (9th Cir. 1987), *cert. denied*, ____ U.S. ____, 102

1450 n.1 (9th Cir. 1986). The City accordingly did not pursue this argument on appeal and the appellate court likewise did not consider it.

L.Ed.2d 55 (1988) (rural lands category had eight groups of allowable uses and 42 groups of special uses); *Shelter Creek Development Corp. v. City Of Oxnard*, 838 F.2d 375 (9th Cir.), *cert. denied*, ____ U.S. ____, 102 L.Ed.2d 106 (1988) (undisputed that planning commission did not insist on strict compliance with general plan and variances were available to permit proposed development); *Kinzli v. City Of Santa Cruz, supra*, 818 F.2d at 1449 (seven permitted uses in greenbelt category together with a catchall provision permitting unspecified "other uses"); *American Sav. & Loan Ass'n v. County Of Marin*, 653 F.2d 364 (9th Cir. 1981) (county could make provision for changes in density requirements and no precise limitations on density).

The petition for rehearing further pointed out that, by contrast, the record in this case established that the voter-imposed ordinance: (1) was not a part of a legislatively enacted general zoning ordinance designed to be implemented by an administrative body; (2) did not create a wide variety of multiple uses or provisions to vary density requirements that must be considered by an administrative body; (3) was specifically aimed only at one landowner's property; (4) was designed by its terms to control precisely and in minute detail the development of that property without vesting any discretion in an administrative body; and (5) applied its precise limits on the maximum permitted development in perpetuity without the possibility of any change by an administrative body until the voters indicated that such a change was appropriate. Thus, there was no room for any further meaningful administrative action under Measure Q and that was exactly the way the voters of the City of Berkeley wanted it. *See, City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672-673 (1976). The petition concluded that there was, therefore, no basis upon which to dismiss the case on ripeness grounds under the controlling law.

The Ninth Circuit requested a response from the City [App. A-31], and in its response, the City conceded for the first time that Santa Fe need not seek a variance because a California Government Code provision (Section 65906) prohibits a landowner "from seeking a variance for uses other than those authorized by the applicable zoning ordinance." (Answer to Petition for Rehearing at p. 6) This concession was fatal to the City since it

recognized that Santa Fe's proposed uses and those of Measure Q are irreconcilable and that the City was without power to vary the terms of Measure Q to accommodate Santa Fe's proposed uses. If a variance request is futile, so too is a development application. Although Santa Fe had made precisely this argument in its briefing in the Court of Appeals, the Ninth Circuit nevertheless denied the petition for rehearing without comment on January 3, 1989. (App. A-32)

V

REASONS FOR GRANTING THE WRIT

A. Introduction

This Court has never approached the ripeness doctrine in a mechanical manner, nor has it viewed the doctrine as a means to frustrate those who must deal with administrative agencies or those who seek to assert their constitutional rights. Rather, the Court—along with other circuits applying the Court's ripeness analysis—has simply directed federal courts to inquire whether the definitive position of the administrative agency is, for all practical purposes, known before determining whether a dispute with the agency is ripe for judicial scrutiny.

The dominant line of cases in the Ninth Circuit, as epitomized by this case, has followed a dramatically different path that cannot be reconciled with the flexible approach adopted by the Court and by other circuits. Even if the landowner's application for administrative relief would, as a practical matter, be futile, these Ninth Circuit cases mechanically hold that a development application and request for variance must nevertheless be filed. (App. at A-26) *E.g., Lai v. City And County Of Honolulu*, 841 F.2d 301, 303 (9th Cir.), *cert. denied*, ___ U.S. ___, 102 L.Ed.2d 586 (1988); *Lake Nacimiento Ranch v. San Luis Obispo County, supra*, 830 F.2d at 977; *Shelter Creek Development Corporation v. City Of Oxnard, supra*, 838 F.2d at 375; *Kinzli v. City Of Santa Cruz, supra*, 818 F.2d at 1449. This restrictive reading of the ripeness doctrine, that mechanically requires one more application and request for variance no matter what, defeats

the ends of justice, undermines the orderly principles of adjudication the ripeness doctrine legitimately attempts to further, and creates a road map for governmental agencies to establish meaningless and prohibitively expensive obstacles to the resolution of landowners' constitutional claims.[6]

This Court would no doubt be the first to recognize that a landowner's fundamental right to pursue a claim for just compensation for the taking of its property should not be made to turn on the circuit (or panel within the circuit) where the landowner happens to bring such a claim. Nor would it endorse the needless waste of public and private resources that the Ninth Circuit's mechanical approach to ripeness engenders. Yet, the Ninth Circuit has viewed this Court's opinion in *MacDonald, Sommer & Frates v. County Of Yolo, supra*, 477 U.S. at 340, as the springboard for the kind of endless bureaucratic nightmare visited on Santa Fe. Surely this Court did not expect or intend that its holding in *MacDonald* would become an instrument to avoid indefinitely the adjudication of federal constitutional claims or to force landowners to the substantial expense of submitting and resubmitting development applications to an administrative body that cannot provide any meaningful response to such an application. That, however, is the very pattern that this Court's opinion in *MacDonald* has been relied upon to set. The Ninth Circuit's recent pronouncements here and elsewhere, which cannot be reconciled with opinions in other circuits, provide the only evi-

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[6] Two Ninth Circuit cases (one decided after the Ninth Circuit issued its mandate here) arguably adhere to the flexible approach to the ripeness doctrine reflected in the opinions of this Court and of other circuits. While the context in which the ripeness issue was resolved differs markedly from the summary disposition Santa Fe received, these cases seemingly would permit a landowner to proceed without the necessity of one more application and request for variance when the local agency has given the landowner "the final message . . . [and] the end of the road [has been] reached. . . ." *Hoehne v. County Of San Benito*, ___ F.2d ___, 1989 WL 21534 at p. 7 (9th Cir., March 15, 1989). *See also, Herrington v. County Of Sonoma*, 834 F.2d 1448 (9th Cir. 1987), amended by, 857 F.2d 867 (9th Cir. 1988).

dence needed to show that this unconscionable pattern of unfairness will persist unless this Court acts immediately to correct it.

B. The Ninth Circuit's Mechanical "One More Application" Approach To Ripeness Irrationally Undermines The Fundamental Right Of A Landowner To Obtain Compensation For The Taking Of Its Property

1. In Order To Ensure That The Resolution Of Legitimate Claims Will Not Be Needlessly Avoided Or Postponed, This Court And Other Federal Courts Have Adopted A Flexible Approach For Determining Ripeness And This Case Indisputably Presents A Ripe Controversy Under That Flexible Approach

The purpose of the ripeness doctrine is to prevent the courts "through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967); *see also, Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. 190, 200 (1983). There is no mathematical formula for determining when a dispute "ripens" from the abstract into the concrete. Rather, that inquiry is a pragmatic one that turns on the facts of each case. *Abbott Laboratories v. Gardner, supra*, 387 U.S. at 148-149. As this Court noted in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941):

> [T]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

This Court has never exempted Just Compensation Clause cases from this flexible and rational approach. On the contrary, as this Court pointed out in *MacDonald, Sommer & Frates v. County of Yolo, supra*, 477 U.S. at 348: "[t]o this day [the court has] 'no set formula where regulation ends and taking begins.' " (Quoting

Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).)[7] Instead, for purposes of evaluating the ripeness of such a taking dispute, the information that this Court "insisted on knowing [was] the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." 477 U.S. at 351.

This Court likewise did not place any mechanical restrictions on how a court might answer the question of whether a final and authoritative limitation on development had been established, and with good reason. There are a wide variety of ways a court can satisfy itself that such a final determination had been made. On the facts before it in *MacDonald*, that determination could not be made until a development application was filed. But this Court did not suggest that if the nature and extent of permitted development could be determined *without* a development application, or that if such an application would *not* alter the final and authoritative determination of the type and intensity of the development already determined, that an application nonetheless *had* to be filed. Indeed, the two things that were perfectly clear in *MacDonald* were that the administrative agency could grant appropriate relief, and that if it could not have done so, this Court would not have subjected the landowner to further unfair and meaningless procedures before the agency. 477 U.S. at 348-352 & n.7.

The same was true in *Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at 172, where the landowner's claim was deemed not ripe because the owner had failed to submit a variance request even though "[i]t appear[ed] that variances could have been granted." *Id.* at 187. That being so, this Court held that "respondent has not yet obtained a final decision regarding how it will be allowed to develop its property" and the claim was not ripe. *Id.* at 190.

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[7] *See also, Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (courts will "examine . . . the 'taking' question by engaging in essentially ad hoc, factual inquiries. . . . "). *Accord, Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

Other circuits have likewise recognized that the actual and realistic availability of administrative relief is a key component of ripeness. Accordingly, once the type and intensity of permitted development has been finally determined, further applications are unnecessary. *See, A.A. Profiles, Inc. v. City Of Fort Lauderdale,* 850 F.2d 1483 (11th Cir. 1988); *Corn v. City Of Lauderdale Lakes,* 816 F.2d 1514 (11th Cir. 1987); *Loveladies Harbor, Inc. v. United States,* 15 Ct. Cl. 381, 386 (Ct. Cl. 1988). *See also, Naegele Outdoor Advertising Inc. v. City Of Durham,* 844 F.2d 172, 174-175 (4th Cir. 1988). *Compare, Unity Ventures v. Lake County,* 841 F.2d 770, 776 (7th Cir.), *cert. denied,* ____ U.S. ____, 102 L.Ed.2d 216 (1988); *Landmark Land Co. Of Oklahoma, Inc. v. Buchanan,* ____ F.2d ____, 1988 W.L. 126469 (10th Cir. 1988); *Littlefield v. City Of Afton,* 785 F.2d 596, 609 (8th Cir. 1986).

For example, in *A.A. Profiles, Inc. v. City Of Fort Lauderdale, supra,* 850 F.2d at 1483, the Eleventh Circuit found a landowners' claim ripe when the city had adopted an ordinance which was designed to rezone the owner's property so as to prohibit development of a wood-chipping operation the city had earlier approved. The court rejected the notion that the landowner needed to do more to obtain review of his claim because "[t]he rezoning ordinance undeniably constituted a final, definitive position." 850 F.2d at 1487 (footnotes omitted). *A.A. Profiles, Inc.* follows the Eleventh Circuit's earlier decision in *Corn v. City Of Lauderdale Lakes, supra,* 816 F.2d at 1514. In *Corn,* the court found that the finality requirement for ripeness was met when the city passed zoning ordinances whose purpose was to place a moratorium on the uses which the landowner had been making of his property. The court concluded that "since the subject ordinances called for a complete moratorium on Corn's development of his property, a request for a variance would plainly have been futile." *Id.* at 1516. The claim was therefore deemed ripe for review.

This case is strikingly similar and equally ripe. The text of Measure Q and its legislative history, together with the binding factual allegations of Santa Fe's complaint, establish that the voter-imposed zoning ordinance governing Santa Fe's property affords it no meaningful procedures and accords the City Council

no flexibility to allow economically viable development. The finality of this ordinance flows not from any considerations involving its subsequent application, but from its immutable and plain terms, as well as from the clear intent of the voters who passed it. Indeed, a further development application by Santa Fe cannot possibly sharpen any issue.

The Waterfront and Specific Plans expressly incorporated into Measure Q by the voters describe in explicit detail the type and intensity of development that will be permitted and the City Council has no power to change that. By express legislative design, as implemented by the City's electorate, only the voters can amend or modify Measure Q and its constituent parts. Thus, Santa Fe has no avenue available to it to seek an administrative application under Measure Q that would allow development to proceed because Measure Q already establishes, in perpetuity, an inflexible development cap. Moreover, Santa Fe is foreclosed from submitting a "meaningful" development plan in the first instance because, as Santa Fe has alleged and should be entitled to prove, the maximum permitted development under Measure Q is so confiscatory as to constitute a taking of Santa Fe's property. As the district court acknowledged, Santa Fe has already filed comprehensive development applications that fully reflect its reasonable expectations and those expectations cannot be realized because of Measure Q's prohibition on such development. (App. A-11)

Where, as here, the operative zoning ordinance represents a confiscatory cap on any proposed development, and no administrative body is empowered to approve any non-confiscatory development plan, "the final and authoritative determination of the type and intensity of development" is known and the case is ripe for adjudication. Under these circumstances, the landowner should not be required to pursue further proceedings before an administrative body in order to present a concrete controversy. Where the maximum permitted development under the controlling zoning ordinance is confiscatory, no application under such an ordinance would be meaningful or, stated differently, any application under such an ordinance would of necessity be futile. The terms of the ordinance itself supply every fact a court needs

to establish an actual case or controversy because the terms provide the definitive position on the legally permitted development.[8]

Since the "definitive position" of the City is known through the voters' passage of Measure Q, which conclusively establishes precisely what development will be permitted, the finality requirement established by this Court in *Williamson* and *MacDonald* is satisfied. Futile applications or reapplications—and this case fits either situation—are not required, and a case like this one is ripe for adjudication under the flexible standard this Court has espoused. *E.g., MacDonald, Sommer & Frates v. County of Yolo, supra*, 477 U.S. at 352-353 n.8; *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. at 192-193; *A.A. Profiles, Inc. v. City Of Ft. Lauderdale, supra*, 850 F.2d at 1486-1487; *Corn v. City Of Lauderdale Lakes, supra*, 816 F.2d at 1516.

2. The Rigid And Mechanical Ripeness Standard Adhered To In The Ninth Circuit's Cases Invites Bureaucratic Manipulation As A Means Of Defeating A Landowner's Right To Have Its Just Compensation Claims Resolved

While the Ninth Circuit nominally permits consideration of the merits of a claim if the landowner's application for the administrative relief would be futile, it has taken the position in a line of cases beginning with *Kinzli v. City Of Santa Cruz, supra*, 818 F.2d at 1449, that the futility of further applications is not a basis for permitting a landowner's Just Compensation claim to be heard. Yet, in two other cases, the Ninth Circuit seemingly recognized and then applied what amounted to a futility exception, when it was apparent that a final and authoritative determination of the type and intensity of development had, for all practical purposes, been made. This divergence of authority has left landowners in the Ninth Circuit at the mercy of the panel selected to hear their cases and has created confusion in the district courts which, like the district court here, have reluctantly

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[8] Where, on the other hand, relief is possible from the administrative agency, the agency's decision is not final or authoritative, and the claim is not ripe. *See, e.g., Unity Ventures v. Lake County, supra*, 841 F.2d at 776.

felt compelled to follow *Kinzli*'s mechanical approach to the ripeness of land use disputes. (App. 12) *See, e.g., Zilber v. Town Of Moraga*, 692 F. Supp. 1195, 1199 and nn. 3, 4, 5 (N.D.Cal. 1988) (appeal pending).

In *Kinzli*, the Ninth Circuit interpreted this Court's opinion in *MacDonald* mechanically to require both a rejected development plan *and* a rejected application for a variance in *all* circumstances before determining whether a taking claim is ripe. 818 F.2d at 1454. While the court in *Kinzli* purported to recognize the "futility" doctrine in Takings Clause cases, it held that such a futility argument cannot even be raised until the landowner has submitted a development plan and sought a variance. *Id.* Then, in *Lake Nacimiento Ranch v. San Luis Obispo County, supra*, 830 F.2d at 977, the Ninth Circuit again held that the futility exception cannot apply without a rejected development application and a request for a variance. The court stated: "[a]s explained in *Kinzli*, '*at least one* meaningful application for a development project must be made. . . .' In addition, the Ranch must also have made a meaningful application for a variance under the zoning ordinance. . . ." *Id.* at 980.

Finally, in *Shelter Creek Development Corporation v. City of Oxnard, supra*, 838 F.2d at 375, the Ninth Circuit held that the futility exception to the ripeness requirement is simply "unavailable unless and until [the] landowner has submitted at least one 'meaningful application' for development of the property and 'one meaningful application' for a variance." *Id.* at 379 (quoting from *Kinzli v. City Of Santa Cruz, supra*, 818 F.2d at 1454-1455). *Shelter Creek* illustrates the lengths to which the Ninth Circuit appears willing to go in its mechanical reading of the ripeness requirement. In that case the court held that before a landowner could obtain an adjudication of its federal claims, it had to file a request for a special use permit under a county ordinance from whose operation the California Supreme Court had already held the owner was exempted as a matter of state law. 838 F.2d at 380.[9]

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[9] In fact, there are only two Ninth Circuit cases holding a landowner's claim to be ripe, and only one in which the Court of Appeals has held

The opinion in this case is the next logical step in the Ninth Circuit's prevailing illogical application of the ripeness doctrine. Here, the Court of Appeals flatly acknowledged that no matter how certain it may be that the landowner's development and variance requests will be denied, an application for development is necessary to render the claim ripe for adjudication. (App. A-29-A-30) Thus, while Santa Fe had succeeded in showing that Measure Q was sufficiently final and authoritative to satisfy the standard of ripeness articulated by this Court in *MacDonald*, it could not satisfy the mechanical "one more application" standard the Ninth Circuit has transformed *MacDonald* into.

So completely and automatically did the Court of Appeals embrace the notion that a landowner is barred from litigating his claim absent such an application, that it ignored the plain language and the legislative history of Measure Q. It did this by accepting the representation of the City's retained counsel made after the litigation was filed and reiterated with great effect on appeal, that the City Council would interpret Measure Q's terms "flexibly."[10] However, since the intent of Measure Q is to divest

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that the landowner should be allowed to survive a summary adjudication in order to prove allegations of futility. *Hoehne v. County Of San Benito, supra*, 1989 W.L. 21534. In the other case, *Herrington v. County Of Sonoma, supra*, 857 F.2d at 567, there had been no pretrial motion to dismiss for lack of ripeness and the Court of Appeals merely held that the authoritative testimony from responsible county officials adduced at trial demonstrated that further applications from the landowner would in fact have been futile. *Id.*, at 569. Neither *Herrington* nor *Hoehne* automatically insists on a further development application and request for variance, even in the face of newly enacted ordinances. Rather, these cases look to whether "the end of the road [has been] reached." *Hoehne v. County Of San Benito, supra*, 1989 W.L. at 21534 at p. 7. *See also, Herrington v. County Of Sonoma*, 857 F.2d at 569. The prevailing *Kinzli-Lake Nacimiento-Shelter Creek* line of authority, on the other hand, erects seemingly mindless roadblocks to judicial review for landowners by mechanically requiring the filing of "one more application," regardless of the futility of doing so.

[10] To be more precise, the Court of Appeals "rel[ied] on Berkeley's claim, both in its briefs and at oral argument, that section 5 [of Measure Q] gives city planners discretion to apply Measure Q's terms

the Council of any authority to alter the scope and intensity of development authorized by the ordinance, this post-litigation representation should have been accorded no weight.[11]

Thus, instead of adhering to the pragmatic path followed by this and other courts, the Ninth Circuit has adopted a ripeness standard that has yielded inconsistent and often indefensible results and that has made the adjudication of landowner's Just Compensation claims more like traversing a mine field than

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flexibly." (App. A-30, n.3) But, as the City's attorneys conceded in the district court, Section 5 is nothing more than a boilerplate savings clause which was intended as a direction to a *court* which may be called upon to interpret the Measure. It does not directly or indirectly purport to vest the City Council with discretion to vary the terms of Measure Q. The voters, by design, took that discretion away. *See*, n.11 *infra*.

[11] The voters were told that by enacting Measure Q they "locked the City in" to the development permitted in it and that no other development could be permitted unless they said so. (App. A-53) That being so, neither the City's attorney nor the City Council is empowered to undermine what the voters accomplished. Instead, the plain language and the intent of the ordinance must be followed. *Chevron U.S.A. v. National Resources Defense Council, Inc.* 467 U.S. 837, 842- 843 n.9. (1984); *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980). In this case, however, at both the trial and appellate levels, the courts accepted the City's attorneys' post-litigation representation that the City Council could alter the terms of Measure Q in some unspecified manner if Santa Fe would only submit one more application. Yet, no evidence was ever supplied showing how the City Council perceives Measure Q, even assuming the views of the City Council were dispositive of the meaning of an ordinance passed by the voters and not by the Council. Moreover, an unsupported post-litigation representation of counsel is not an authoritative construction of an ordinance. *Securities Ind. Assn. v. Fed. Reserve Bd.*, 468 U.S. 137, 143-144 (1984); *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971). By accepting this maneuver in the present case the Court of Appeals abdicated its own independent responsibility to interpret the meaning of the Measure by discerning the voters' intent. The Court of Appeals—not the City Council or its attorneys—was the final arbiter of the issue that makes this case ripe for review. *E.g., Fagner v. Heckler*, 779 F.2d 541, 543 (9th Cir. 1985); *Cruz v. Zapata Ocean Resources, Inc.*, 695 F.2d 428, 431 (9th Cir. 1982).

pursuing a lawsuit. In doing so, the Ninth Circuit has created a standard in its dominant line of cases which can never be satisfied. By mechanically insisting on an application and a request for variance—or here one more application and a request for variance—when such action cannot possibly affect the maximum level of permitted development, the Ninth Circuit is obviously misconstruing and then misapplying the Court's reasoning in *MacDonald*. *See*, pp. 15-19, *supra*. As the district judge observed in *Zilber v. Town Of Moraga*, *supra*, 692 F.Supp. at 1195, n.5:

> This [Ninth Circuit] rule seems to be a departure from the ripeness principle enunciated by the Supreme Court. The teaching of *Williamson* and *MacDonald* was that courts should not speculate about whether a city will apply a zoning statute to preclude all beneficial use. Consequently, the property owner must pursue any procedures by which he may develop available beneficial use of the property before challenging application of the statute. However, implicit in this rule is the premise that the staute leaves some beneficial use to the property owner. If it does not, then submission of a development application to obtain approval for a beneficial use would be pointless and therefore no speculation about the outcome of the application would be necessary. But this premise, applied by the district court in *Kinzli*, is precisely the one rejected by the Ninth Circuit. *See also*, *id.* at 1195 nn.3, 4 (labeling the *Kinzli* analysis as somewhat "oxymoronic").

In fact, the Ninth Circuit's rigid application of a requirement that there be one more application after enactment of the ordinance encourages courts to accept the kinds of desperate, eleventh-hour maneuvers which litter the history of this case and similarly encourages governmental entities to reach into their bottomless bag of bureaucratic "requirements" at the last minute.[12] If the imagination of bureaucrats is the only limit to prevent

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[12] In this case, for example, the City was uncovering new bureaucratic obstacles even at the petition for rehearing stage. There, for the first time in the litigation, it introduced a supposed development application that Santa Fe could allegedly pursue under Measure Q before the City

adjudication of a landowner's rights, those rights will never be adjudicated on their merits. As the district court expressly recognized, the frustrating process awaiting a landowner can go on "as in many other cases that we have, for years and years, where litigants or property owners are caught in a bureaucratic morass that has no end and [they] can never get into court." (App. A-12) Despite its obvious sympathy with Santa Fe's position, the district court felt bound by the Ninth Circuit's reading of the ripeness doctrine to require the submission of another development request no matter how futile that request may be. As the district court diplomatically put it: " . . . the Ninth Circuit has a higher . . . frustration . . . quotient than some of us would tolerate." (*Id.*)

Given the timing and language of Measure Q, and the unyielding administrative process that preceded it, Santa Fe at a minimum should have been allowed to prove its allegations—which had to be accepted as true for purposes of a motion to dismiss under Rule 12 [*Scheuer v. Rhodes, supra,* 416 U.S. at 236]—that it was the victim of bureaucratic and legislative subterfuges, thrown up in bad faith, to deny just compensation for the taking of its property. To hold otherwise defeats the owner's constitutional right to just compensation and advances no legitimate purpose the ripeness doctrine is intended to serve. As the Court of Claims recently explained in *Loveladies Harbor, Inc. v. United States, supra,* 15 Ct. Cl. at 381: "Plaintiffs should not be forced to submit to piecemeal litigation nor some endless series of requirements. . . . The requirements of ripeness in the area of Fifth Amendment takings also cannot be so extended as to become

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Council. The document was unauthenticated and uncertified. No explanation was provided as to who promulgated it or under what authority. No evidence was submitted to show that it enjoyed the approval of the City Council or, more importantly on this record, the Berkeley electorate. The City nevertheless insisted that this after-the-fact invention rendered the dispute unripe and left the court powerless to act. Just such a scenario was portrayed by Justice Brennan in his dissent in *San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621, 655 n.22 (1981), where he quoted the following advice from one city attorney to others on how to avoid a landowner's assertion of the Just Compensation clause: " 'If all else fails, merely amend the regulation and start over.' "

more exhaustive than the substantive issues presented by the takings claim itself." *Id.* at 386.

This Court's recent cases hold out the promise that the Just Compensation Clause is not a dead letter and that the rights of landowners, like those of other citizens, will be protected. *See, e.g., First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987); *Nollan v. California Coastal Commission,* ____ U.S. ____, 97 L.Ed.2d 677 (1987). The Ninth Circuit ripeness standard in land use cases not only fails to give meaning to that promise, it actually undermines it. By forcing landowners in the circuit into an endless bureaucratic morass where their rights are not resolved, a fair resolution of Just Compensation claims is avoided indefinitely. That result is intolerable and cannot be the legacy this Court intended its *MacDonald* opinion to leave behind. As this case and other Ninth Circuit cases demonstrate, the time to redress the Ninth Circuit's misconstruction of *MacDonald* is at hand and the facts of the present case provide the appropriate vehicle for the Court to do so.

VI

CONCLUSION

Santa Fe has expended millions of dollars over a period of nearly 20 years in unsuccessful efforts to get some reasonable development approved for its property. It has been rebuffed at every turn by the maneuverings of the City. The Ninth Circuit, through its inflexible and mechanical interpretation of the ripeness doctrine, has now condemned Santa Fe to spend more substantial amounts of money and several more years in a procedural quagmire only to prove what the record here already shows—further administrative proceedings are useless because Measure Q is not administratively amendable or modifiable in any fashion that will permit any meaningful economic development.

The flexible rationale of the ripeness doctrine is not served by refusing to hear a taking claim either where the agency has already made a final decision or where it has no discretion to grant a reasonable development application (*e.g.*, through a variance or other appropriate mechanism), under the operative zoning ordi-

nance. A landowner is not obligated to submit to "unfair procedures," and where the preconditions that give rise to the ripeness requirement are not present, the doctrine ought not to be blindly invoked. The Ninth Circuit's mechanical reading of the ripeness doctrine requiring one more application for development and one more request for a variance in all cases is wrong and in conflict with this Court's opinions and those of other circuits. In order to check the mischief and unfairness the Ninth Circuit's standard has engendered, this petition for certiorari shoud be granted to clarify the law of ripeness as applied in land use cases.

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